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314600—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 941

THE CONTINENTAL CASUALTY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 55–59) is reported in 33 F. Supp. 65. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 65–66) is reported in 117 F. (2d) 506.[1]

[1] The Circuit Court of Appeals decided the present case upon the authority of its opinion in *United States* v. *Hartford Accident & Indemnity Co.*, 117 F. (2d) 503, handed down concurrently with the instant decision.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered February 27, 1941 (R. 66). The petition for a writ of certiorari was filed on April 12, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A duplicate adjusted-service certificate was issued to a veteran upon proof of loss of his original certificate and the filing of a bond as required by Section 13 of the Act of July 3, 1926. The veteran died and the proceeds of the duplicate certificate were paid to the beneficiary designated therein. Thereafter, an impostor hypothecated the original certificate with a Regional Office of the Veterans' Administration and obtained payment thereon from the Treasury of the United States. The question presented is whether the surety on the bond is liable to pay the losses and damages which the United States incurred by reason of the payment on the original certificate.

STATUTES INVOLVED

The applicable portions of the statute involved are set forth in the Appendix.

STATEMENT

Pursuant to Section 13 of the Act of July 3, 1926, *infra*, p. 9, Marion Schley Davis, a veteran

of the World War, to whom an adjusted-service certificate had been issued, represented to the Administrator of Veterans' Affairs that the certificate had become lost, stolen, or destroyed, and requested that a duplicate be issued to him (R. 2–3). After furnishing an indemnity bond in the sum of $1,537.00, with the petitioner as surety, he was issued a duplicate adjusted-service certificate (R. 2–4, 32).

Davis died on November 11, 1930 and payment of the face value of the duplicate adjusted-service certificate less certain loans was made to his widow and designated beneficiary (R. 4.) Thereafter, on March 2, 1931, the original adjusted-service certificate was hypothecated by an impostor representing himself to be the veteran Davis as security for a loan in the amount of $516.22 from the Philadelphia Regional Office of the Veterans' Administration (R. 5, 23). A check for the sum of $516.22, payable to the order of the deceased veteran Davis was drawn upon the Treasurer of the United States, and delivered to the imposter who forged the indorsement of the deceased veteran thereon and ultimately obtained payment through banking channels from the Treasurer of the United States (R. 5). Under date of January 20, 1938, the Comptroller General of the United States, by a settlement certificate, determined that the estate of Davis as principal and petitioner as surety were indebted to the United States in the sum of $672.99,

which represented the amount paid on the original certificate plus interest, less certain credits (R. 29–31). Demand was thereafter made on petitioner for payment, which was refused (R. 6).

The United States brought suit against petitioner in the United States District Court for the Southern District of New York (R. 2–31). The petitioner's answer denied liability, contending, insofar as is now material, that the loss sustained by the United States was not within the coverage of the bond (R. 32–35). Cross motions for summary judgments were filed, and upon consideration thereof the District Court entered judgment for petitioner (R. 55–59). On appeal, the Circuit Court of Appeals for the Second Circuit reversed (R. 66).

ARGUMENT

The statutes pursuant to which the bond in suit was given required a bond conditioned "to indemnify and save harmless the United States from any claim upon such [original] lost or destroyed certificate." See *infra,* p. 9. The condition of the bond is that the obligors shall pay to the United States all sums which the United States may be called upon to pay on account of the establishment of any "valid adverse claim" to the proceeds of the described Adjusted Service Certificate, "and shall well and truly indemnify and save harmless the United States from any claim" on account of the certificate "and from all damage, loss, costs,

charges, and expenses which the United States may sustain * * * in consequence of any such claim * * *" (R. 40). Below petitioner contended that the words "any claim" were merely illustrative of "valid adverse" claims and did not enlarge the surety's undertaking. Petitioner now concedes, however, that "any claim" includes invalid as well as valid claims of third persons against the United States (Pet. pp. 9–10), and that the bond undertakes to indemnify the United States for any loss or expense incurred in defending against invalid claims (Pet, pp. 6, 7–8).[2] That an imposter's application for a loan is a "claim" on account of the original certificate is not controverted. Petitioner now contends, primarily, that the loss sustained by payment of such claims through mistake is a consequence of the Government's voluntary and negligent act and that the bond does not protect against losses so incurred (Pet. pp. 8, 9–10, 16–17). But the most obvious risk of the issuance of a duplicate certificate, and the risk against which it was presumably the primary purpose of the bond to protect, was that a second payment might be made through mistake to the holder of the original certificate after the legal obligation had been fully discharged

[2] It is therefore unnecessary to consider the question, discussed by petitioner and the court below (Pet. pp. 4–5, 15, 24–25), whether the Government could incur a binding obligation to banks or other parties to which the term "valid adverse claim" might apply.

by lawful payment on the duplicate. The fact that the negligence of an agent of the Government may contribute to the loss is no bar to recovery, even though the bond does not expressly cover losses caused by such negligence. *Hart* v. *United States,* 95 U. S. 316, 318; *Jones* v. *United States,* 18 Wall. 662; *United States* v. *Witten,* 143 U. S. 76.

It is true, as petitioner asserts (Pet. 11), that the Veterans' Administration formerly took the position that bonds in the form of that in suit did not cover losses incurred by payments to an impostor upon the original certificate. This view proceeded, however, upon the theory now abandoned by petitioner that the bond covered only valid claims, and the Comptroller General, when the issue was submitted to him, ruled that the losses in question were covered by the bond, 14 Comp. Gen. Dec. 770.[3]

Petitioner also suggests (Pet. pp. 3–4) that its liability should be limited in the light of the risks to which the Government was exposed at the time the statute requiring the bond was enacted in 1926 and that, since loans were not authorized until 1927, the statute should be construed as not requiring protection against risks incurred in the making of loans. If the reach of the statute is to be limited by implication to the actual contemporaneous risks, it may with equal force be argued that when the

[3] Petitioner's assertion (Pet. 11) that the Comptroller General ruled that the losses were not covered by the bond is incorrect.

Congress authorized loans and in the same statute (Act of March 3, 1927, c. 359, 44 Stat. 1389, 1390) amended the bond requirement without qualifying the words "any claim," it manifested its intention that "any claim" should include those arising by reason of the making of loans. Moreover, it is well settled that the bond may enlarge, though it may not restrict, the coverage required by the statute, particularly where, as here, the administrative agency is authorized to make regulations. *United States* v. *Mora,* 97 U. S. 413, 420–421; *United States* v. *Hodson,* 10 Wall. 395, 407; *Bank of Brighton* v. *Smith,* 5 Allen (Mass.) 413, 415.

Finally, petitioner urges that a writ should be granted in the instant case because of the importance of the question presented. While it is true that a large number of bonds has been filed to secure the United States against losses resulting from the issuance of duplicate certificates, nevertheless the number of claims in connection therewith has been small and in many instances collections have been effected without suit.[4] It is not expected that a material increase will occur in the number of these cases, since final payment on the adjusted

[4] We are informally advised that 81 claims on duplicate certificate bonds have been transmitted by the Veterans' Administration to the Comptroller General as not collectible through administrative channels. In almost a third of these cases, payment has been either received or the indebtedness has been determined to be uncollectible by reason of the financial condition of the surety.

service certificates was made in 1936. Plainly there is no occasion for this Court to review this case in the absence of a conflict of decisions, which is not claimed.

CONCLUSION

The decision below is correct. No conflict exists and no question of importance is presented. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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MAY 1941.